

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-2063

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-2063

AHARON RON,

Appellant,

-vs-

GEORGE C. WILKINSON, Warden,
Federal Correctional Institution
Danbury, Connecticut, et al.,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR APPELLANT

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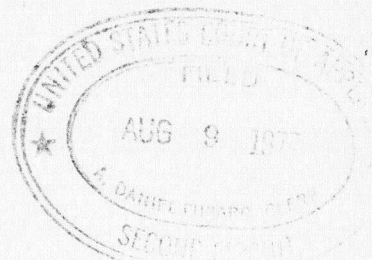


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PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the District of Connecticut dismissing Appellant's Petition for a Writ of Habeas Corpus. The basis of Appellant's motion is a claim that he has been unlawfully denied ninety days of statutory good time.

STATEMENT OF FACTS

Petitioner was incarcerated at the Lexington Federal Correctional Institute. On September 14, 1976, petitioner followed a visitor to an old farm building which he had been allowed to use for prayer in the past. He was found in the building and an incident report was submitted charging petitioner with "escape (prohibited act #101.)" (See list of prohibited acts on the reverse side of incident report.)

A Unit Disciplinary Committee (which determines the charges to bring against an inmate), met on September 15, 1976, and modified the charges to escape and being in an unauthorized area (prohibited act #402). The UDC, composed of Dr. Ross, Mary McCroskey, and Carl Moses, referred the matter to the Institution Discipline Committee (which holds hearings on charges brought by the UDC.)

Prior to petitioner's IDC hearing, he was presented with a notice of the IDC hearing, a notice of his rights before the IDC hearing, and a form requesting representation at the IDC hearing.

Petitioner, who does not communicate well in the English language, did not understand the forms and refused to sign the first two forms. He was not permitted to sign only the form requesting representation, and was not afforded any representation at the IDC hearing.

Petitioner's IDC was comprised of E.R. Slaughter, D.E. Couchman, and Ray W. McCroskey, husband of Mary McCroskey.

At Petitioner's IDC hearing, held on September 21, 1976, the charges were altered to exclude "escape" and to include two new charges: "unauthorized contact with the public (prohibited act #702)" and "contact with a visitor in violation of posted regulations (prohibited act #703)" (and the old charge of "being in an unauthorized area"). Petitioner was not informed as to which posted regulation he had violated.

Petitioner, admitting only that he had been in the farm building, was found guilty of these three charges. The IDC recommended forfeiture of 280 days statutory good time, transfer to a more secure institution, and continued disciplinary segregation.

Petitioner appealed the action of the IDC to Lexington's Warden on October 8, 1976. On October 26, 1976, the Warden modified the IDC findings to expunge the charge of unauthorized contact with the public and reduced the number of forfeited days to 90.

Petitioner submitted a petition for a writ of habeas corpus to the District Court, claiming that he had been denied due process

of law. He requested the return of his 90 days statutory good time and the expungement from his record of all references to the incident.

The District Court dismissed the petition on May 6, 1977 without requiring the government to answer and without holding a hearing.

Petitioner filed a motion for reconsideration May 16, 1977, which was denied May 25, 1977.

Petitioner filed a notice of appeal June 3, 1977.

QUESTIONS PRESENTED

1. Whether the District Court erred in finding that petitioner's admission of his presence in the area subsequently alleged to be unauthorized removed any possible defense to the charge of being in an unauthorized area.

2. Whether the District Court erred in finding that the refusal to grant petitioner a representative at his Institutional Disciplinary Committee hearing did not prejudice him.

3. Whether the District Court erred in finding that petitioner was given adequate notice of both charges determined at the Institution Disciplinary Committee hearing.

4. Whether the District Court erred in ignoring the presence of close relatives on the Unit Disciplinary Committee (which recommended the sanction) and the Institution Disciplinary Committee (which made the final decision) when finding the latter impartial.

5. Whether the District Court erred in finding that petitioner was not denied due process of law.

6. Whether the District Court erred in dismissing the petition without requiring the Government to respond to the petition.

ARGUMENT

I. PETITIONER WAS NEVER INFORMED THAT THE BARN WHERE HE AND HIS VISITOR WERE FOUND WAS AN UNAUTHORIZED AREA, OR THAT VISITATION WAS NOT PERMITTED THERE. THIS LACK OF NOTICE CONSTITUTES A DEFENSE TO THE CHARGES OF BEING IN AN UNAUTHORIZED PLACE AND OF UNAUTHORIZED CONDUCT WITH A VISITOR.

The requirements of the Due Process Clause of the Fifth Amendment include notice. Petitioner's status as a prisoner does not eliminate the need for notice although the standard for the specificity of that notice may be somewhat relaxed in correctional institutions.

It should be emphasized that our ruling that vagueness principles must be applied in light of the legitimate needs of prison administrators does not confer upon prison officials a license to punish inmates pursuant to broad, sweeping regulations. Many types of prison conduct which are deemed undesirable or dangerous may be foreseen, and due process may well require that prison officials publish clearly drawn regulations specifying those types of proscribed conduct which can be reasonably anticipated. This is particularly important with respect to conduct which might otherwise seem innocent to an inmate. Meyers v. Alldredge, 492 F.2d 296, 311 (3rd Cir. 1974).

At minimum security facilities such as Lexington, inmate visitation is not limited to one building, but may be conducted in relaxed settings over a wider geographical area. Petitioner has alleged (and it has not been controverted) 1) that he often used that farm building to pray and 2) that staff members at F.C.I. Lexington knew that he did so, giving him at least implicit authorization to be in that area. It would have been possible for prison

officials to designate that building as off limits for visiting purposes if they deemed such conduct undesirable. Since they did not do so, and since petitioner had no reason to believe that he was committing a punishable offense, the defense of lack of notice should be available to him.

II. PETITIONER WAS ENTITLED TO A REPRESENTATIVE AT HIS INSTITUTIONAL DISCIPLINARY COMMITTEE HEARING, AND THE REFUSAL TO GRANT HIM THAT REPRESENTATIVE WAS PREJUDICIAL.

The Bureau of Prisons Policy Statement 7400.5D states "An inmate will be provided the service of a full time staff member to represent him at the hearing before the Institution Discipline Committee should he so desire." (Par. C2) This right is not conditioned upon an inmate's signing of the notice of the IDC hearing or his signing of the notice of his rights at the IDC hearing. Petitioner requested and was denied such a representative.

While the Supreme Court has not found a universal constitutional right to representation at prison discipline hearings, it has found that right do exist for certain inmates and in certain circumstances.

Where an illiterate inmate is involved, however, or where the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case, he should be free to seek the aid of a fellow inmate, or if that is forbidden, to have adequate substitute aid in the form of help from the staff or from a sufficiently competent inmate designated by the staff. Wolff v. McDonnell, 418 U.S. 539, 570.

As set forth in his petition, petitioner does not communicate with fluency in the English language; his spoken English is poor and his written English is almost non-existent. The issues at the hearing, as argued above, were also of some complexity. Presentation of a coherent defense therefore demanded the existence of a representative.

Though petitioner did concede his presence in the barn, the plausibility of his version of how he and his visitor arrived there, as well as his prior history of approved barn visits, were important points requiring forceful presentation. Thus the refusal to grant petitioner a representative to provide such a presentation was indeed prejudicial to petitioner. Furthermore, a retrospective 'no prejudice' test is not appropriate when petitioner has been denied a right which the Bureau of Prisons states in its policy statement should have been granted him.

III. PETITIONER WAS NOT GIVEN ADEQUATE NOTICE OF THE CHARGES DETERMINED AT THE INSTITUTION DISCIPLINARY COMMITTEE HEARING.

We hold that written notice of the charges must be given to the disciplinary-action defendant in order to inform him of the charges and to enable him to marshal the facts and prepare a defense. At least a brief period of time after the notice, no less than 24 hours, should be allowed to the inmate to prepare for the appearance before the Adjustment Committee. Wolff v. McDonnell, 418 U.S. 564 (1973).

Petitioner was given written notice of the charges of escape (prohibited act #101) and being in an unauthorized place (prohibited

act #402). However, at his IDC petitioner alleged that he was further charged with unauthorized contact with the public (prohibited act #702) and conduct with a visitor in violation of posted regulations (prohibited act #703) (the charge of escape was also dropped at that time). A defense to these two charges requires the gathering of different facts and arguments than the charges to which petitioner was given notice. The Supreme Court specifically disapproved of the reshaping of charges after notice has been given. Wolff v. McDonnell, 418 U.S. 564 (1973).

Petitioner's ability to assemble facts and arguments was already severely limited by his difficulty with the English language and the prison's refusal to provide him with a representative. Time in which to prepare for the charges was thus especially important for petitioner, yet it was constitutionally denied him.

IV. THE PRESENCE OF CLOSE RELATIVES ON PETITIONER'S UNIT DISCIPLINARY COMMITTEE AND HIS INSTITUTIONAL DISCIPLINARY COMMITTEE DENIED PETITIONER HIS RIGHT TO AN IMPARTIAL HEARING.

Morrissey v. Brewer, 408 U.S. 471, (1972) held that the determination of whether reasonable grounds exist for parole revocation must be made by someone not directly involved in the case. This separation of the decision maker from those bringing the charges was held necessary because "the officer directly involved in making recommendations cannot always have complete objectivity in evaluating them." Ibid, 486.

While no violation was found on the facts presented, the Supreme Court assumed that impartiality is a requisite for a committee charged with making a decision on the forfeiture of good time. Wolff v. McDonnell, 418 U.S. 534, 568-70. See also U.S. Ex Rel Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973) (holding that minimum due process in an in-prison disciplinary hearing requires a factual determination by a person or persons other than the officer reporting the infraction).

In this case, the District Court's Memorandum of Decision disposed of petitioner's claim concerning a lack of impartiality at his institutional disciplinary hearing by describing it as "a conclusory allegation" without any supporting facts (p. 2). The court ignores petitioner's allegation that "upon information and belief, Mary McCroskey, a member of petitioner's UDC and Ray W. McCroskey, a member of petitioner's IDC, are related." (paragraph 18).

Petitioner does not allege any improper conference between this husband and wife, but contends that the presence of close relatives on the sanction-recommending UDC and the decision-making IDC render the latter partial as a matter of law.

V. PETITIONER WAS DENIED DUE PROCESS OF LAW.

"The fundamental requisite of due process is the opportunity to be heard." Grannis v. Ordean, 234 U.S.385, 394 (1914). This

hearing must be "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 386, U.S. 545, 552 (1965). Also, "The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." Goldberg v. Kelly, 397 U.S. 254, 268-269 (1969).

The refusal to grant petitioner a representative, the failure to provide him with prior notice of the charges against him, and the lack of an impartial decision making body made a meaningful hearing impossible. This hearing was not conducted with an eye to petitioner's capacities or circumstances. Whatever the sufficiency of petitioner's separate complaints, they clearly combined to deprive him of due process.

VI. THE DISTRICT COURT SHOULD NOT HAVE DISMISSED APPELLANT'S PETITION.

A Court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing respondent to show cause why the writ should not be granted, unless it appears from the application that the appellant or person detained is not entitled thereto. 28 U.S.C. 2243 (emphasis added.)

Petitioner has alleged facts which, if true, set forth a denial of due process of law. The district court should therefore either have ordered the respondent to show cause or have granted the writ.

Where no order to show cause is issued and no return is made or hearing had, the law requires that all of the allegations of fact contained in the petition be treated as true. Williams v. Kaiser, 323 U.S. 471 (1944). Petitioner's description of the facts surrounding his hearing must therefore be regarded by this court as true.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court below and hold that petitioner was deprived of due process of law, restoring Petitioner's statutory good time and expunging his record of the incident.

Respectfully submitted,

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CERTIFICATION

I hereby certify that a copy of the foregoing was mailed to the Office of the United States Attorney, 270 Orange Street, New Haven, Connecticut, 06510, this 2nd day of August, 1977.
